Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

THOMAS R. HUTCHINSON, individually,

Petitioner,

versus

RICHARD B. PFEIL, MARY JOAN PFEIL, ART SERVICES INTERNATIONAL, INC., WILLIAM H. GERDTS, DAVID BERNARD DEDARINGER, SONA JOHNSTON, and SOUTH CINHA PRINTING COMPANY,

Respondents.

HOPE COBB,

Petitioner,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether issues of standing under both prongs of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) and (B), should be decided under the same or different criteria depending on the type of violation alleged, i.e., whether standing requirements for false association or product infringement claims should differ from those for false advertising claims.

Whether the test for antitrust standing which this Court set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), is an appropriate test for determining a party's standing under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

Whether an applicant-in-intervention is required to file a notice of appeal within thirty days after entry of an order denying intervention as of right under Federal Rule of Civil Procedure 24(a)(2) when that same order terminates the action as to all claims and all parties, notwithstanding the fact that a party to the action has filed a timely motion to alter the final judgment under Federal Rule of Civil Procedure 59(e).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *Hutchinson v. Pfeil*, No. 98-5260 (App. A at 1a) is reported at 211 F.3d 515 (10th Cir. 2000). Orders of the district judge in *Hutchinson v. Pfeil*, No. 94-C-711-E (N.D. Okla. Feb. 26, 1998, and Aug. 1, 1995) (App. B at 16a and App. C at 25a) are not reported.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Tenth Circuit was entered April 4, 2000. A timely-filed petition for panel rehearing was denied May 25, 2000 (App. D at 31a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a) (1993).

STATUTE AND PROCEDURAL RULE INVOLVED

Section 43(a) of the Trademark Act of 1946 (Lanham Act), 60 Stat. 441, as amended, 15 U.S.C. § 1125(a), provides in relevant part:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure provides in relevant part:

> If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> . . .
>
> (iv) to alter or amend the judgment under Rule 59 . . . .

STATEMENT OF THE CASE

In stating the facts material to consideration of the questions presented, petitioners Thomas R. Hutchinson and Hope Cobb have been guided by two axioms. First, "the way questions of law are decided and reviewed in our system [is that] the adversaries present their versions of the law to the court and the court renders its determination after making an independent assessment of what the law is." *Elder v. Holloway*, 984 F.2d 991, 993-94 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc). Second, "[e]very issue in every case turns on both fact and law, facts outside a legal framework are as irrelevant as abstract legal principles. *Id.* at 993.

The district court had subject matter jurisdiction, under 15 U.S.C. § 1121(a) and 28 U.S.C. § 1331, of the Lanham Act claims asserted by petitioner Thomas R. Hutchinson.

Alleged violations of Section 43(a)(1)(A) and (B) of the Lanham Act gave rise to petitioner's prayer for injunctive relief. Hutchinson's false association and false advertising claims are based on defendants' use, in commerce, of false and misleading descriptions and representations of fact about an oil painting by American Impressionist Theodore Robinson that was once part of the Pfeil Collection.[1] Defendants identify this painting as "The E.M.J. Betty" in *Masterworks of American Impressionism from the Pfeil Collection*,[2] while Hutchinson calls it "the Pfeil 'E.M.J. Betty,'" "the unfinished 'E.M.J. Betty,'" or "the Pfeil painting."

Hutchinson filed this civil action when he learned that the unfinished "E.M.J. Betty" was in the Pfeil Collection and

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[1] The Pfeils sold this painting during the pendency of the litigation. Hutchinson has no knowledge of its whereabouts or the identity of its current possessor.

[2] This elaborate, full color catalogue was prepared in conjunction with a nationwide tour of the Pfeil Collection. Those responsible for the Robinson catalogue entries include curator Sona Johnston, who failed to provide art historian David Dearinger with all of the information she had about the unfinished "E.M.J. Betty," including the fact that she had no factual basis for statements made about its provenance and exhibition history in the Theodore Robinson catalogue published by the Baltimore Museum of Art in 1973; Dearinger who did nothing to confirm the accuracy of Johnston's representations before adopting them as his own; Professor William H. Gerdts who edited Dearinger's draft entries but did nothing to assure their accuracy; Art Services International which edited Gerdts and Dearinger's work then published *Masterworks*; the Pfeils who reserved the right to approve the work of Gerdts, Dearinger, and Johnston; and South China Printing Company which printed *Masterworks*.

concluded that *Masterworks* contains representations that are literally false, i.e., the artist signed and dated that painting, and then exhibited it under the title "The E.M.J. Betty."

Hutchinson is not a "mere intermeddler" who is minding other people's business. He claims an ownership interest, as a descendant of one of Theodore Robinson's heirs, in the painting the artist signed, titled "The E.M.J. Betty," and then exhibited under that title, but never sold. That painting disappeared after Theodore Robinson died in 1896, and is (and was) referred to as "the real 'E.M.J. Betty'" for purposes of litigation.

Hutchinson's Lanham Act claims[3]

After completing, to his satisfaction, one of at least two oil paintings of a market boat named "E.M.J. Beatty," Theodore Robinson signed and titled the finished painting "The E.M.J. Betty." While this painting was on display in Robinson's one-man show at Macbeth Gallery in 1895, it was described by the *New York Sun* art critic as "a fine old hulk of a sloop high and dry at low tide." Theodore Robinson also exhibited the painting in Philadelphia and Atlanta before his death in 1896. Because the artist did not sell the real "E.M.J. Betty," it was an asset of his estate.

The Robinson estate sale catalogue lists the "Article" to be sold as Lot 73 as "The E.M.J. Betty." No representation is made that that "Article" is the oil painting Robinson exhibited under that title. Rather, the catalogue contains the disclaimer, under conditions of sale, that the sale of any article is not to be set aside on account of any error in the description and that all articles are sold as is, without recourse. Business records maintained by the American Art Association, managers of the Robin-

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[3] "On review of the Court of Appeals' affirmance of summary judgment for respondents, [this Court] accepts as true the evidence presented by petitioner." *Beck v. Prupis,* 120 S.Ct. 1608, 1612 n.3 , 146 L.Ed.2d 561, 567 n.3 (2000).

son estate sale, reflect that music publisher G. Schirmer paid $32.50 for Lot 73, but do not describe or give the dimensions of that or any other "Article" sold at the Robinson estate sale.

Lot 73 ["the Schirmer 'E.M.J. Betty'"] is not the painting the artist exhibited at Macbeth Gallery and the Cotton States Exposition in Atlanta. The Schirmer "E.M.J. Betty" is a watercolor painting of a rural landscape. Its estate sale provenance and subject matter have been verified and are indisputable.

Because the real "E.M.J. Betty" was not sold at the 1898 Robinson estate sale, Hutchinson and other descendants of the artist's heirs own that painting as cotenants by virtue of various statutes of intestate succession.

False descriptions and representations of fact that were used to pass off the unfinished "E.M.J. Betty" as the real "E.M.J. Betty" and which are likely to deceive as to the artist's approval of that painting.

Robinson "signed and dated" the painting

The words "Signed and dated at lower right" describe the signature, with its "C"-shaped "T," and the date seen in the color reproduction of the Pfeil "E.M.J. Betty" in *Masterworks.* The quoted phrase connotes that it was Theodore Robinson who signed and dated that painting.

Hutchinson was not the first to discover what appeared to be forged signatures on a number of paintings by Theodore Robinson.[4] Handwritten notes made by curator and Robinson expert John I.H. Baur more than forty years before his death in

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[4] Exemplars of signatures by which the validity of the signature on the Pfeil "E.M.J. Betty" can be judged are found on paintings the artist is known to have sold and on reproductions of Robinson paintings and drawings that appeared in print before he died.

1987, suggest that he considered "C"-shaped "Ts" he observed in signatures on two Robinson paintings to be irregular when he described those signatures as "queer."

Though the Pfeils reserved the right to challenge Hutchinson's assertion that the signature and date on the unfinished "E.M.J. Betty" are forged, they did not. When Hutchinson took the depositions of Johnston and Gerdts, each of whom identified the other as one of four living experts on Theodore Robinson, the Pfeils' lawyer did not examine either "expert" on this issue.

Johnston declined to express an opinion as to the authenticity of the signature and date on the Pfeil painting, but could not identify a single Robinson painting, among hundreds she has seen since the early 1970s, which the artist is known or thought to have sold that has a queer, "C"-shaped "T" in the signature. Nor could Johnston point to a "C"-shaped "T" in the signature on any reproduction of Robinson's work that appeared in print before his death. However, she and Gerdts know of paintings attributed to Robinson that have forged signatures.

Robinson "exhibited" the painting

The following representations about the exhibition history of the Pfeil "E.M.J. Betty" appear in *Masterworks:*

> *The E.M.J. Betty* was exhibited a number of times, beginning with Robinson's first one-artist show held early in 1895 at the Macbeth Gallery in New York City. All the works then circulated for several years throughout the South and Midwest, on view most notably in the 1895 Cotton States and International Exposition in Atlanta, where Robinson was among the most heavily represented artists.

Similar representations, but in a different format, were incorporated by reference when Gerdts and Dearinger characterized

Johnston's 1973 Theodore Robinson catalogue as a "standard work[] on Robinson" in the section of *Masterworks* devoted to the Pfeil "E.M.J. Betty."

> *Exhibitions:* 1895, Macbeth Gallery, no. 12; 1895 Cotton States and International Exposition, no. 520; 1896, St. Louis Museum, no. 15; 1897, Cincinnati Museum Assoc., no. 13.

Johnston had no evidence to link the unfinished "E.M.J. Betty" with Robinson's exhibition of the real "E.M.J. Betty" at Macbeth Gallery or the Cotton States Exposition, in 1973, when her Theodore Robinson catalogue was published. Nonetheless, she made the representations quoted above. The same can be said of Dearinger and Gerdts. All three "art historians" simply assumed that the Pfeil "E.M.J. Betty" was **the painting** the artist exhibited under the title "The E.M.J. Betty."

The Pfeils reserved the right to contest Hutchinson's assertion that the Pfeil "E.M.J. Betty" was not exhibited by the artist and to assert that it was; however, they failed to do either. Johnston and Gerdts who have held themselves out as Robinson experts remained mute on the issue.

Entries in catalogues printed during the artist's life establish that Theodore Robinson exhibited a painting he titled "The E.M.J. Betty" at Macbeth Gallery in New York, the Pennsylvania Academy of the Fine Arts in Philadelphia, and the Cotton States and International Exposition in Atlanta in 1895.

Robinson's name, New York address, and the painting's title are inscribed on stretchers of paintings Robinson is known to have exhibited at Macbeth Gallery, the Cotton States Exposition and elsewhere, e.g., "Afternoon Shadows," "The Watering Pots," "Watching the Cows," "The Watering Place," and "White Bridge." Similar inscriptions are not on the stretcher of the Pfeil painting.

Robinson titled the painting "The E.M.J. Betty"

The fact that Theodore Robinson gave a painting of an old schooner high and dry at low tide the title "The E.M.J. Betty" is established by catalogues of the Macbeth Gallery and Cotton States exhibitions and the *New York Sun* review of the artist's one-man show. The fact that Robinson wrote the titles of paintings he exhibited on the stretcher and that the unfinished "E.M.J. Betty" has no such inscription is established by uncontroverted evidence. The only title the Pfeil painting is known to have had before 1968, when Kennedy Galleries bought it, is "Repairing Boats on Long Island." These facts, taken together, establish that the title of the Pfeil "E.M.J. Betty" is plagiarized.

Tenth Circuit's affirmance of summary judgment on the issue of Hutchinson's standing to assert Lanham Act claims.

Motions to dismiss and for summary judgment filed by all defendants who had appeared[5] were granted August 1, 1995, on grounds that Hutchinson lacked standing to assert his false advertising claim under the Lanham Act. (App. C at 25a-30a). This ruling[6] was based on the following undisputed facts (which Hutchinson contends are not "material" to the standing issue):

> Plaintiffs admit that they do not have the "real E.M.J. Betty," have never seen the "real E.M.J. Betty" or a copy of the "real E.M.J. Betty" and do not know who is in possession of the "real E.M.J. Betty." (App. C at 28a).

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[5] Defendant South China Printing Company waived service of summons, pursuant to Rule 4(d) of the Federal Rules of Civil Procedure, but never appeared in the trial or appellate court.

[6] The interlocutory appeal Hutchinson took from this order, pursuant to 28 U.S.C. § 1292(a)(1), was dismissed on jurisdictional grounds. *See Hutchinson v. Pfeil*, 105 F.3d 566 (10th Cir. 1997).

and the district court's application of recently-enunciated circuit law:

> "[T]o have standing for a false advertising claim the plaintiff must be a competitor of the defendant and allege a competitive injury." Stanfield v. Osborne Industries, Inc., 52 F.3d 867 (10th Cir. 1995).
>
> Plaintiffs argue, relying on Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991), that they can establish ownership of the "real E.M.J. Betty" and are therefore competitors with standing to bring this claim. Plaintiffs also assert . . . that the amended complaint does allege competition. Plaintiffs, however, miss the point. Defendants presented undisputed evidence that calls into question Plaintiffs standing and Plaintiffs are unable to refute that evidence.
>
> The fact that Plaintiffs can establish ownership of the "real E.M.J. Betty" does not, alone, satisfy the requirements of standing. Plaintiffs do not now, and have not in the past competed with the Pfeils. Moreover they do not know the location of the "real E.M.J. Betty" which would allow them to compete with the Pfeils at this time. In fact, they do not know that the "real E.M.J. Betty" exists at this time. The potential of competition is insufficient to confer standing, particularly when the potentiality is as speculative as it is in this case. See Stanfield, 52 F.3d at 873. (Emphasis in original) (App. C at 28a-29a).

This 1995 standing ruling became final on February 27, 1998, when the trial court's order granting defendants' motions

to enter judgment for South China Printing Company on the same basis was entered on the docket. (App. B at 16a, 20a).

Whether Hutchinson had standing to sue under § 43(a) for false advertising or false association were issues the Court of Appeals addressed separately because the Tenth Circuit takes a dichotomous approach, as the panel noted in its opinion:

> "There are two distinct bases for liability under section 1125: (1) false representation in advertising concerning the qualities of goods (false advertising claims); and (2) false representations concerning the origin or endorsement of goods (false association or product infringement claims)." *Stanfield*, 52 F.3d at 873. Each requires an injury sufficient to confer standing, with the type of harm dependent on the focus of the claim. For a false advertising claim designed to prevent unfair competition, the plaintiff "must be a competitor of the defendant and allege a competitive injury;" for a false association claim designed to prevent product misidentification, the plaintiff must allege a "reasonable interest to be protected" in the subject goods or services, or in the misused mark causing a misidentification. *Id.* (App. A at 7a).

The Court of Appeals agreed with the district court's standing analysis of Hutchinson's false advertising claim, as well as its conclusion, which was summarized as follows:

> [E]ven if Mr. Hutchinson could establish, in some abstract sense, an ownership interest in the posited "real" E.M.J. Betty, the compounded uncertainties inherent in any concrete realization of that interest rendered the potential for harmful competition from defendants' rival painting too

> speculative to confer standing for a false advertising claim. (App. A at 7a).

Turning to Hutchinson's false association claim,[7] but failing to consider the second type of commercial injury alleged in his amended complaint,[8] the appellate panel held:

> The same uncertainties which undercut Mr. Hutchinson's false advertising claim also undermine his false association claim. With no present prospect of locating an extant finished work with which the Pfeils' painting has allegedly been misidentified, "he has no reasonable interest to be protected under the Lanham Act," and "[w]ithout a protectible interest, [he] lacks standing to bring this [false association] claim under section 1125." [*Stanfield*, 52 F.3d at 873] (noting "mere potential commercial interest in one's family name is insufficient to confer

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[7] Although the trial court refused to consider Hutchinson's false association claim when it entered its final order, the Court of Appeals elected to address and decide that issue. (App. A at 8a n.10).

[8] The following injuries that can be traced to the challenged action of the defendants were alleged in Hutchinson's pleadings:

> Misrepresentations of fact about the unfinished "E.M.J. Betty" have damaged or are likely to damage the owners of the real "E.M.J. Betty," including plaintiffs, [1] by a diversion of sales and [2] by having an adverse effect on those who might otherwise be interested in acquiring finished works of Theodore Robinson, but have been led to believe that paintings such as the unfinished "E.M.J. Betty" are, in fact, paintings which the artist himself considered to be finished works worthy of being signed, exhibited and offered for sale during his lifetime.

> standing" for false association claim). (App. A at 8a).

The following statement, found in another section of the appellate court's opinion, sheds light on what the panel meant when it concluded that Hutchinson had "no reasonable interest to be protected under the Lanham Act":

> [O]ur analysis of Mr. Hutchinson's standing does not depend on legal ownership issues but, rather, the practical unavailability of the painting .... (App. A at 15a).

Having determined the issue of statutory standing by applying circuit precedent, i.e., *Stanfield*, the panel focused its attention on Hutchinson's Article III standing, then wrote:

> [T]he utterly speculative character of Mr. Hutchinson's interest and consequent injury not only undercuts statutory standing under the Lanham Act, but constitutes a fundamental Article III deficiency as well.
>
> ...
>
> Mr. Hutchinson was unable to show that the alleged "real" E.M.J. Betty exists,[9] let alone

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[9] When the panel made this "finding," it overlooked undisputed record evidence from which the following inferences can be drawn: (1) Theodore Robinson exhibited the real "E.M.J. Betty" in New York, Philadelphia, and Atlanta; (2) the Pfeil "E.M.J. Betty" is not the real "E.M.J. Betty"; (3) the Schirmer "E.M.J. Betty" is not the real "E.M.J. Betty"; (4) between 500 and 600 paintings and works on paper have been attributed to Theodore Robinson; (5) records the artist maintained reflect that he sold less than 50 paintings; (6) only ninety-four of Theodore Robinson's paintings were sold at his estate sale; and (7) Robinson paintings that have not been seen in public for years continue to surface.

> that he will likely locate the painting and obtain it from any current possessor. His claim of injury rests on "conjecture based on speculation that is bottomed on surmise," and cannot support federal jurisdiction under Article III. For essentially the same reasons, a remedial order curtailing the Pfeils' use of the E.M.J. Betty name would not at present -- or likely in future -- inure to Mr. Hutchinson's benefit, so his action fails under the redressibility prong as well. (App. A at 9a-10a) (citations omitted).

In sum, the Court of Appeals held that "Mr. Hutchinson's standing is deficient precisely because *he has no product* in competition with the Pfeils' painting." (Emphasis in original) (App. A at 11a).

Intervention sought by owner of Schirmer "E.M.J. Betty"

On March 8, 1996, Hope Cobb, the granddaughter of music publisher G. Schirmer, filed a motion to intervene as of right and assert a false advertising claim against the defendants. Grounds for allowing Cobb to intervene include those quoted below:

> Hope Cobb has learned within the past year that the Pfeils and certain predecessors in interest, namely Kennedy Galleries, Inc. and R.H. Love Galleries, Inc., had misappropriated the estate sale provenance that properly belongs to a watercolor she now owns and which her grandfather, Gustave Schirmer, bought as Lot 73 at the Theodore Robinson estate sale.
>
> In promoting the unfinished "E.M.J. Betty" as part of their Collection in Masterworks of American Impressionism from the Pfeil Collection,

the Pfeils adopted by reference statements Sona Johnston made about that oil painting in what they now refer to as one of two "standard works on Robinson," including her representations that G. Schirmer bought that painting as Lot 73 at the Theodore Robinson estate sale and then sold it to Kennedy Galleries, representations for which there is no factual support.

Hope Cobb has "a direct, substantial, and legally protectable interest in the [pending] proceedings." Hobson v. Hansen, 44 F.R.D. 18, 24 (D.D.C. 1968). Permitting her to intervene in this action will enable her to protect [1] her legal interest in the Robinson Estate Sale provenance that rightly belongs to her watercolor and [2] her valid title to that painting. This will be done by filing a motion for injunctive relief and directing this Court's attention to evidence in the record which establishes that defendants' representations about the provenance of the unfinished "E.M.J. Betty" are literally false. Such evidence entitles her to the injunctive relief sought by her proposed pleading.

The legal interests which Hope Cobb seeks to protect by intervening in this action and asserting her false advertising claim are not and cannot be adequately represented by any existing party. Although plaintiff Thomas R. Hutchinson has a legal interest in the real "E.M.J. Betty," he has no legally protectable interest in the Schirmer "E.M.J. Betty."

The purposes underlying Rule 24 would be furthered by allowing the intervention sought by Hope Cobb. Moreover, it would avoid a multi-

> plicity of suits, i.e., her having to file a separate action in another district to assert her false advertising claim.
>
> The intervention of Hope Cobb will not unduly delay or prejudice the adjudication of the rights of the original parties. Because most, if not all, of the evidence relevant to the Court's determination of Hope Cobb's false advertising claim has already been made part of the record in this case, her claim can be litigated while the issue of plaintiff's standing is being decided by the Tenth Circuit on the interlocutory appeal now pending in that court.

Had the district court granted the relief sought by the proposed complaint attached to Cobb's motion to intervene, defendants would have been permanently enjoined from printing or otherwise disseminating in interstate commerce false and misleading information about the early provenance of the Pfeil "E.M.J. Betty," i.e., that it had been bought by G. Schirmer as Lot 73 at the Robinson estate sale.

Court of Appeals' *sua sponte* dismissal of appeal Cobb took from final order denying her motion to intervene as of right under Rule 24(a)(2).

By order entered February 27, 1998, the district court denied Cobb's Rule 24(a) motion for leave to intervene as of right. Stating that her motion "must be analyzed in light of the current procedural posture of this case" (not its posture when her motion was filed two years earlier), the court wrote:

> This case has been dismissed because of the plaintiff's lack of standing. There is no further decision that can be made which would "impair [Hope Cobb's] ability to protect [her] interest." Because of the current posture of this case, inter-

> vention would neither foster judicial economy nor protect her interest from being litigated in a proceeding in which she is not participating. (App. B at 21a).

Cobb challenged this ruling on its merits on appeal, arguing, among other things, that because she satisfied express requirements of Rule 24(a)(2), she should have been permitted to intervene in 1996 so her false advertising claim could have been adjudicated and that the district court's inaction may, as a practical matter, have impaired her protectable interest in the estate sale provenance of the Schirmer "E.M.J. Betty" because the Pfeils had sold the painting and claimed not to know the identity of its purchaser(s). As a footnote to her argument that the district court's failure to act on her motion for two years impaired her right of access to the court, Cobb noted that if her motion to intervene had been denied prior to the time it was, she could have sought immediate appellate review.

Rather than decide the issue of Cobb's intervention on its merits, the panel determined, on its own motion, that Cobb's appeal was untimely and, therefore, must be dismissed.

> The district court denied Hope Cobb's motion to intervene on February 27, 1998. She did not attempt to appeal that order until she joined Mr. Hutchinson's notice of appeal from the final judgment entered over eight months later.
>
> "An order denying intervention is final and subject to immediate review if it prevents the applicant from becoming a party to an action." This is "because denial of intervention precludes the proposed intervenor's ability to appeal the later judgment (and at that time to challenge the earlier denial of intervention)."

> Thus, an appeal from the denial of intervention "cannot be kept in reserve; it must be taken within thirty days of the entry of the order, or not at all." Ms. Cobb's appeal is therefore untimely and must be dismissed. (Citations omitted) (App. A at 2a-3a).

In addition to denying Cobb's motion to intervene, the order entered February 27, 1998, granted defendants' motion for entry of judgment in favor of South China Printing Company. (App. B at 23a). Final judgment was entered March 24, 1998. Hutchinson tendered his Rule 59(e) motion to alter the judgment for filing on March 27, 1998. That post-judgment motion was denied by order entered on November 5, 1998. Cobb and Hutchinson filed their notice of appeal December 4, 1998.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The approach taken by the Ninth and Tenth Circuits to decide issues of standing to assert false advertising and false association claims under Section 43(a)(1) of the Lanham Act is in conflict with decisions of other circuits.

The courts below, both trial and appellate, followed *Stanfield v. Osborne Industries, Inc.*, 52 F.3d 867 (10th Cir.), *cert. denied*, 516 U.S. 920 (1995), precedent in the Tenth Circuit, and applied what the Third Circuit characterizes as a "dichotomous approach" to resolving standing issues under the two prongs of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), (B). *See Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 222 (3d Cir. 1998).

The Tenth Circuit panel that decided *Stanfield* followed the Ninth Circuit's decision in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993), when it held:

> A false advertising claim implicates the Lanham Act's purpose of preventing unfair competition. *See* 15 U.S.C. § 1127. Thus, to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury. *Waits*, 978 F.2d at 1109. . . .
>
> In contrast to a false advertising claim, a false association claim does not require an allegation of competitive injury. *Waits*, 978 F.2d at 1109. A plaintiff must, however, have a reasonable interest to be protected in order to have standing to sue. *Dovenmuehle v. Gildorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989). "Those with standing to bring [a false association] claim include parties with a commercial interest in the product wrongfully identified with another's mark, . . . or with a commercial interest in the misused mark." *Waits*, 978 F.2d at 1109.

Stanfield, 52 F.3d at 873.

The Seventh Circuit, citing *Waits*, also followed the Ninth Circuit in *Heath & Sons, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561, 575 (1993) ("Because Heath is not in the computer business and thus is not a competitor of AT&T, Heath does not have standing to raise the false advertising claim.").

The Third Circuit noted, in its opinion in *Conte*, that the approach taken by the Courts of Appeals for the Seventh, Ninth, and Tenth Circuits conflicts with decisions of other circuits.

> [O]ther courts of appeals [] confer standing upon parties who are not direct competitors or "surrogates" for the same. *See generally* 4 Thomas J.

> McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27.32 at 27-51 (4th ed. 1996) ("With the possible exception of the Ninth Circuit, the courts have held that the plaintiff and defendant need not be in direct competition with each other for plaintiff to have standing to sue . . . under § 43(a)."); *see also PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120 (2d Cir. 1984) (recognizing standing of owner of royalty streams from music recording to bring action against distributor of falsely labeled record albums); *Camel Hair & Cashmere Inst., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6 (1st Cir. 1986) (trade association of makers of cashmere fibers and fabrics, but not finished coats, held to have standing to sue for a preliminary injunction against retailers of coats falsely labeled as containing more cashmere than they had).

Conte Bros., 165 F.3d at 231-32.

Finding that *Waits'* approach enjoys no textual support and fragments standing jurisprudence under § 43(a), the Third Circuit declined to adopt its reasoning and rejected its approach.

> Section 43(a) provides no support for drawing a distinction in standing depending on the type of § 43(a) violation alleged. The operative language that provides for standing -- "any person who believes that he or she is or is likely to be damaged" -- does not purport to distinguish between the two types of actions available under § 43(a). We also note that the Ninth Circuit's approach has been the subject of criticism in subsequent cases and in scholarly commentary. *See, e.g., Guarino v. Sun Co., Inc.*, 819 F.Supp.

> 405, 409 (D.N.J. 1993) (declining to follow Ninth Circuit and noting that the distinction has been rejected by McCarthy); 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:33, at 27-52 to 27-53 (4th ed. 1996) ("The passe semantic argument [in *Halicki*] that there cannot be 'unfair competition' without 'competition' between the parties has often been rejected."); James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 Rutgers L. Rev. 1085, 1136-38 (1995) ("The Ninth Circuit should apply the same criteria when reviewing standing under both section 43(a) subparts.").

Conte Bros., 165 F.3d at 232-33.

The Third Circuit concluded that the test for antitrust standing which this Court set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), provided an appropriate method for adding content to its "reasonable interest" test[10] and adopted it as the test for determining a party's statutory standing under § 43(a) of the Lanham Act. *See Conte Bros*, 165 F.3d at 233.

On conceding it was the first court of appeals to utilize this standing analysis in the context of a Lanham Act claim, the *Conte* court noted that "its use has the imprimatur of two prominent commentators in the area." 165 F.3d at 233 (citing 4 McCarthy, *McCarthy on Trademarks and Unfair Competition*

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[10] The Third Circuit had previously held that "[t]he dispositive question should be whether plaintiff has a reasonable interest to be protected against false advertising." *Serbin v. Ziebart Internat'l Corp.*, 11 F.3d 1163, 1177 (3d Cir. 1993).

§ 27:32 n.1 (4th ed. 1996) ("In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 74 L.Ed.2d 723, 103 S.Ct. 897 (1983)."); Restatement (Third) Unfair Competition, § 3, cmt. f (1995) ("In determining whether an asserted injury is sufficiently direct to justify the imposition of liability, the Supreme Court's analysis of similar issues under federal antitrust law may offer a useful analogy.")

The test adopted in *Conte*, as viewed by the Third Circuit, "provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under both prongs of § 43(a)." 165 F.3d at 236.

Because the approach taken by the Seventh, Ninth, and Tenth Circuits to resolve issues of standing under both prongs of § 43(a) conflicts with decisions of other Courts of Appeals, particularly the holding of the Court of Appeals for the Third Circuit in *Conte*, this Court should grant certiorari to resolve that conflict and decide whether the test adopted by the Court of Appeals in *Conte* should be applied to determine a party's statutory standing under § 43(a).

II.

The Court of Appeals' decision as to the timeliness of Cobb's appeal appears to be in conflict, directly or in principle, with the decisions of this Court in *Stringfellow v. Concerned Neighbors in Action* and *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company.*

This Court's holdings in *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company*, 331 U.S. 519 (1947), and *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987), when read together, stand for the proposition

that an order that denies intervention as of right, without granting permissive intervention with conditions, prior to the entry of a final order or judgment is immediately appealable under the collateral order doctrine. The obverse would also appear to be true.

Orders denying intervention in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior*, 100 F.3d 837 (10th Cir. 1996); *B.H. ex rel. Pierce v. Murphy*, 984 F.2d 196 (7th Cir. 1993); *Credit Francais International, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698 (1st Cir. 1996); and *United States EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990), cases cited in the panel's opinion in this case (App. A at 3a), were all interlocutory orders. Each was "entered during the course of the litigation and *prior to* final judgment in the entire case." *See B.H. ex rel. Pierce v. Murphy*, 984 F.2d at 199 (emphasis added). The order denying intervention in this case was not. That ruling was part of a global, final order that disposed of eleven motions, among them motions to enter judgment for South China Printing Company, which the district court granted. (App. B at 16a-24a).

By operation of law, i.e., Fed. R. App. P. 4(a)(4)(A)(iv), Cobb's time to file her notice of appeal ran from the entry of the November 5, 1998 order that disposed of Hutchinson's Rule 59(e) motion. If his motion had not been filed by March 29, 1998, thirty days after entry of the February 27, 1998 order, Cobb's time for filing a notice of appeal would have expired.

The decision of the Court of Appeals to dismiss Cobb's appeal on grounds that it was untimely, i.e., that her appeal from the denial of intervention had to be taken within thirty days of the entry of the February 27, 1998 order, or not at all, appears to conflict, directly or in principle, with this Court's decisions in *Railroad Trainmen* and *Stringfellow* and express provisions of Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure.

Certiorari should be granted to decide the issue presented by the *sua sponte* dismissal of Cobb's appeal because the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court and because that court has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory powers.

CONCLUSION

For the reasons set forth above, petitioners submit that the Court should allow the writ they seek and decide the questions presented by this petition.

Respectfully submitted,

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APPENDIX A

[Filed April 4, 2000]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-5260

THOMAS R. HUTCHINSON,

Plaintiff - Appellant,

v.

MARY JOAN PFEIL; ART SERVICES INTERNATIONAL, INC.; WILLIAM H. GERDTS; DAVID BERNARD DEARINGER; SOUTH CHINA PRINTING COMPANY; RICHARD B. PFEIL; SONA JOHNSTON,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 94-CV-711-E)

Submitted on the briefs:

Glenn R. Beustring, Joan Godlove, and Todd Alexander, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Lewis N. Carter of Doerner, Saunders, Daniel & Anderson, L.L.P., Tulsa, Oklahoma, for Defendants-Appellees.

Before EBEL, LUCERO, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Plaintiff Thomas R. Hutchinson appeals[1] from the dismissal of his suit under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), for lack of standing. He also challenges certain procedural rulings issued in the course of the proceedings. Joining in his notice of appeal are Hope Cobb, whose motion to intervene in district court was denied, and several individuals whom Mr. Hutchinson proposed to add as plaintiffs when he unsuccessfully moved to amend his pleadings. For reasons stated below, we dismiss the appeals of Ms. Cobb and those proposed plaintiffs, deny their joint motion to intervene in the Hutchinson appeal, and affirm all of the rulings challenged by Mr. Hutchinson.

Cobb's Appeal from Denial of Intervention

The district court denied Hope Cobb's motion to intervene on February 27, 1998. She did not attempt to appeal that order until she joined Mr. Hutchinson's notice of appeal from the final judgment entered over eight months later.

"An order denying intervention is final and subject to immediate review if it prevents the applicant from becoming a

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted on the briefs without oral argument.

Mr. Hutchinson insists that we should not consider appellees' answer brief, because it was filed six days after the deadline set by Fed. R. App. P. 31(a)(1). It is, however, within this court's discretion to permit the late filing of a brief for good cause. *See* Fed. R. App. P. 26(b). The exercise of that discretion is especially appropriate here, as there is no suggestion of prejudice. *See Hammett v. Seastrunk*, 365 F.2d 232, 233 n.2 (4th Cir. 1966). Mr. Hutchinson himself tested the forbearance of this court by filing a deficient opening brief four days after a twice-extended deadline. This court thus finds good cause to allow the filing of appellees' answer brief.

party to an action." *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Department of the Interior*, 100 F.3d 837, 839 (10th Cir. 1996). This is "because denial of intervention precludes the proposed intervenor's ability to appeal the later judgment (and at that time to challenge the earlier denial of intervention)." *B.H. ex rel. Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993). Thus, an appeal from the denial of intervention "cannot be kept in reserve; it must be taken within thirty days of the entry of the order, or not at all." *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 703 (1st Cir. 1996); *see Hunter v. Department of the Air Force Agency*, 846 F.2d 1314, 1316-17 (11th Cir. 1988) (distinguishing final order denying intervention from appealable interlocutory orders for which immediate review in lieu of appeal from final judgment is optional); *see, e.g., B.H. ex rel. Pierce*, 984 F.2d at 199; *United States EPA v. City of Green Forest*, 921 F.2d 1394, 1401 (8th Cir. 1990); *Marks v. U.S. West Direct*, No. 98-1043, 1998 WL 856139, at **1 (10th Cir. Dec. 11, 1998) (unpublished), *cert. denied*, 119 S.Ct. 1757 (1999). Ms. Cobb's appeal is therefore untimely and must be dismissed. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) ("the taking of an appeal within the prescribed time is mandatory and jurisdictional").

Proposed Plaintiffs' Appeal

After the case had been pending in district court for some time, Mr. Hutchinson filed a motion to amend his pleadings to, among other things, add several new plaintiffs under Fed. R. Civ. P. 21. The proposed plaintiffs did not themselves invoke the power of the court by, for example, moving to intervene under Fed. R. Civ. P. 24. Thus, they are not parties to the action nor have they affirmatively sought and been denied such status.

"A nonparty does not have standing to appeal in the absence of most extraordinary circumstances." *Coffey v. Whirlpool Corp.*, 591 F.2d 618, 619 (10th Cir. 1979) (insurer lacked

standing to appeal where district court denied insured's motion to vacate dismissal to permit substitution of insurer as plaintiff). Such circumstances are clearly not present here. Indeed, two distinct considerations undercut the proposed plaintiffs' appellate standing. The first is their indirect, passive relationship to the proceedings conducted in district court. To paraphrase an apt, albeit non-precedential, statement of the Second Circuit, expressly relying on our *Coffey* decision in a similar case: the plaintiff -- not the proposed plaintiffs -- moved to amend his complaint, and he -- not they -- is the proper party to appeal the denial of that motion. *See Kahn v. Chase Manhattan Bank, N.A.*, Nos. 97-7213, 97-7233, 1997 WL 734139, at **2 (2d Cir. Nov. 25, 1997) (unpublished). The second consideration relates to the proposed plaintiffs' lack of a substantive interest in the outcome. Because the action was dismissed based on Mr. Hutchinson's lack of standing and thus without any ruling on the merits, the proposed plaintiffs are in the same position as the non-party denied appellate standing in *Coffey:* "no requirement is imposed upon [the proposed plaintiffs] to do anything" to preserve their claims; the dismissal by the court was without prejudice to their interests. *Coffey,* 591 F.2d at 619.

Appellate Intervention

Ms. Cobb and the proposed plaintiffs also moved to intervene on appeal, in case their joinder in the notice of appeal filed by Mr. Hutchinson was ineffective. We deny the motion for reasons peculiar to each movant. As for Ms. Cobb, the motion is, in effect, an attempt to obtain appellate review lost by her failure to timely appeal the denial of her motion to intervene in district court. Appellate intervention is not a means to escape the consequences of noncompliance with traditional rules of appellate jurisdiction and procedure. *See, e.g., United States v, Dorfman,* 690 F.2d 1217, 1223 (7th Cir. 1982) (defendants who prematurely appealed suppression order "cannot circumvent the rule against . . . interlocutory appeal" by intervening in third-party appeal); *United States v. Ahmad,* 499 F.2d 851, 854 (3d

Cir. 1974) (party who failed to file notice of appeal "cannot circumvent the requirements for taking an appeal in his own right by a later petition for intervention" in another's appeal).

The proposed plaintiffs lacked standing to obtain direct appellate review and, thus, do not seek intervention to excuse a failure to perfect a proper appeal. Their request, however, is undercut by a different omission. As noted above, they never moved to intervene in the district court. "'A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court.'" *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997) (quoting *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962)); *see Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997); *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985). Nothing stated in their conclusory motion or inherent in the surrounding circumstances suggests the requisite justification for the proposed plaintiffs' intervention on appeal.

Hutchinson's Standing to Sue

On summary judgment, the district court held that Mr. Hutchinson could not satisfy the requirements for standing under the Lanham Act set out by this court in *Stanfield v. Osborne Industries, Inc.*, 52 F.3d 867 (10th Cir. 1995). On de novo review, *see Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593 (10th Cir. 1996), we reach the same conclusion. Further, we hold that the standing deficiencies implicate the limitations of Article III of the Constitution.

> Plaintiffs bear the burden of proving standing with the manner and degree of evidence required at the particular stage of the litigation. In response to a summary judgment motion, the nonmovant must present specific facts by affidavit or other evidence, which will be taken as true

> for purposes of the motion. Summary judgment is then proper if there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law.

Gilbert v. Shalala, 45 F.3d 1391, 1394 (10th Cir. 1995) (citations omitted); *see Cache Valley Elec. Co. v. State of Utah Dep't of Transp.*, 149 F.3d 1119, 1124 (10th Cir. 1998) ("[a]t summary judgment, it is a plaintiff's burden to adduce evidence sufficient to establish necessary jurisdictional facts" and, thus, plaintiff "may not establish standing by merely hypothesizing"), *cert. denied*, 119 S.Ct. 1333 (1999).

Mr. Hutchinson is a descendant of nineteenth century American Impressionist artist Theodore Robinson, who painted a work owned by defendants Richard and Mary Joan Pfeil, entitled E.M.J. Betty.[2] Mr. Hutchinson contends that the Pfeils' painting is actually an unfinished version with a forged signature, and that he has an ownership interest in a finished "real" E.M.J. Betty, allegedly stolen after the artist died in 1896. The thrust of Mr. Hutchinson's Lanham Act claim is that by representing their painting as a finished version of the Robinson work in an exhibition catalogue, the Pfeils have "use[d] in commerce [a] . . . false designation of origin, false or misleading description of fact, or false or misleading representation of fact," in violation of 15 U.S.C. § 1125(a)(1). The other defendants are the corporations which produced and printed the catalogue, and the art historians whose professional work was used for the E.M.J. Betty annotation therein.

"There are two distinct bases for liability under section 1125: (1) false representation in advertising concerning the

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[2] After entry of judgment, the Pfeils sold the E.M.J. Betty. The sale does not affect our analysis and, for simplicity, we continue to refer to it as the Pfeils' painting.

qualities of goods (false advertising claims); and (2) false representations concerning the origin or endorsement of goods (false association or product infringement claims)." *Stanfield*, 52 F.3d at 873. Each requires an injury sufficient to confer standing, with the type of harm dependant on the focus of the claim. For a false advertising claim designed to prevent unfair competition, the plaintiff "must be a competitor of the defendant and allege a competitive injury;" for a false association claim designed to prevent product misidentification, the plaintiff must allege a "reasonable interest to be protected" in the subject goods or services, or in the misused mark causing a misidentification. *Id.*

The district court's standing analysis rested on "the undisputed fact that Plaintiffs[3] . . . do not have the 'real E.M.J. Betty,' have never seen the 'real E.M.J. Betty' or a copy of the 'real E.M.J. Betty' and do not know who is in possession of the 'real E.M.J. Betty.'" Appellant's Appendix Vol II (App. II) at 450. In fact, "they do not know that the 'real E.M.J. Betty' exists at this time." *Id.* at 451. The court concluded that even if Mr. Hutchinson could establish, in some abstract sense, an ownership interest in the posited "real" E.M.J. Betty, the compounded uncertainties inherent in any concrete realization of that interest rendered the potential for harmful competition from defendants' rival painting too speculative to confer standing for a false advertising claim. We agree. In the commercial language of *PDK Lab., Inc. v. Friedlander*, 103 F.3d 1105 (2d Cir. 1997), Mr. Hutchinson's "hopes of eventually obtaining . . . a [competitive] product are too remote at this stage to confer standing to challenge [the Pfeils'] advertising." *Id.* at 1112 (plaintiff's proposed rival product, undeveloped and contingent upon future FDA approval, held insufficient to support Lanham Act standing). Further, his inability to compete with the Pfeils'

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[3] The district court refers here to "plaintiffs," as this action was initially prosecuted jointly by Mr. Hutchinson and his wife, who has since died.

painting is not itself a function of the alleged misconduct. *Cf. Stanfield*, 52 F.3d at 873 (plaintiff's unrealized plans to compete with defendant held insufficient to confer standing where his entrance into market was "in no way dependent on the availability of [the] trademark" allegedly misused by defendant).

The same uncertainties which undercut Mr. Hutchinson's false advertising claim also undermine his false association claim.[4] With no present prospect of locating an extant finished work with which the Pfeils' painting has allegedly been misidentified, "he has no reasonable interest to be protected under the Lanham Act," and "[w]ithout a protectible interest, [he] lacks standing to bring this [false association] claim under section 1125." *Id.* (noting "mere potential of commercial interest in one's family name is insufficient to confer standing" for false association claim).[5]

Indeed, the utterly speculative character of Mr. Hutchinson's interest and consequent injury not only undercuts statu-

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[4] Although the broadly framed pleadings potentially encompass both types of Lanham Act violations, the district court refused to consider the false association claim because Mr. Hutchinson did not refer to it until late in the proceedings. Hence, the court did not address the standing issue on that claim. Given the fundamental nature of the issue, we elect to resolve the entire case on standing grounds and therefore need not delve into the parties' dispute over the timeliness of Mr. Hutchinson's specific assertion of the false association claim. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-102 (1998) (discussing analytical priority of standing questions).

[5] Cases holding that an artist incurs injury when his name or work is misused are inapposite. *Cf., e.g., King v. Innovation Books*, 976 F.2d 824, 831 (2d Cir. 1992); *Wildlife Internationale, Inc. v. Clements*, 591 F.Supp. 1542, 1548 (S.D. Ohio 1984). Neither Mr. Hutchinson's name nor any work of his has been misused.

tory standing under the Lanham Act, but constitutes a fundamental Article III deficiency as well.

> The irreducible constitutional minimum of standing contains three requirements. First and foremost, there must be alleged (and ultimately proved) an injury in fact -- a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be causation -- a fairly traceable connection between the plaintiff's injury and the complained-of conduct. And third, there must be redressability -- a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Steel Co., 523 U.S. at 102-04 (footnote, citations, and quotations omitted).

Mr. Hutchinson was unable to show that the alleged "real" E.M.J. Betty exists, let alone that he will likely locate the painting and obtain it from any current possessor. His claim of injury rests on "conjecture based on speculation that is bottomed on surmise," and cannot support federal jurisdiction under Article III. *Utah v. Babbitt*, 137 F.3d 1193, 1210 n.25 (10th Cir. 1998) (quotation omitted) (future injury, contingent on matters "not presently known," too speculative for Article III standing); *see United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989) ("When considering any chain of allegations for standing purposes, we may reject as overly speculative . . . predictions of future events . . . ."); *see also Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 56 (1st Cir. 1998) ("Outside the sphere

of economic theory, predicting future injury and the behavior of third parties is usually suspect."). For essentially the same reasons, a remedial order curtailing the Pfeils' use of the E.M.J. Betty name would not at present -- or likely in future -- inure to Mr. Hutchinson's benefit, so his action fails under the redressibility prong as well. *See Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992) (plaintiff lacks standing where possible benefit from favorable ruling "founders on too many contingencies").

Finally, Mr. Hutchinson contends the absence of demonstrable injury or likely threat of harm is not preclusive with respect to injunctive relief, when the objectionable representations are not just misleading but patently false. In support of this argument, he relies on two lines of authority, neither of which is apposite here. First, he cites several cases holding that the literal falsity of the defendant's statements obviates the need to present proof regarding likely deception or confusion of the consumer. This principle, dubbed the "presumption of deception" by one court, relates to the merits of the case, not the standing of the plaintiff to seek redress for such statements. *See Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1333 (8th Cir. 1997) (noting "presumption of deception" allows factfinder "to assume actual deception, the second element of the cause of action"); *see also Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1138 (4th Cir. 1993) (holding representation "false on its face" or "likely to mislead" is "essential element" of Lanham Act violation); *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993) (explaining literal falsity and likely confusion "are two different theories of recovery" under Lanham Act). Thus, the cases do not invoke this "presumption of deception" to resolve standing issues, but instead to assess the merits of Lanham Act claims, usually asserted by manufacturers of competing products whose obvious standing is not in question.

The second line of authority involves a "presumption of causation and injury" that allows a factfinder to presume injury caused by representations which are literally false or demonstrably deceptive. *See Porous*, 110 F.3d at 1333; *see also McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991); *Abbott Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 16, 18 (7th Cir. 1992). As these cases reflect, this presumption is likewise invoked primarily to resolve the merits of Lanham Act claims -- to establish injury as an essential element of the claim, or irreparable harm as a condition for injunctive relief -- when the plaintiff, typically a commercial competitor of the defendant, clearly has standing. Such cases merely support the proposition that when a plaintiff *with an otherwise sufficient interest to have standing* shows that its interest has been subjected to patently false representations, harm sufficient to sustain a claim and justify equitable relief may be presumed.

We recognize that the merits issue to which this second presumption relates does overlap conceptually with the injury prerequisite for standing, and the presumption has been discussed, albeit rarely and unfavorably, in that connection. *See Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694-95 (2d Cir. 1994) (considering but rejecting presumption in affirming dismissal of Lanham Act claim for lack of standing); *see also PDK Lab.*, 103 F.3d at 1112 (citing *Ortho* as "applying the general rule . . . against making presumptions of injury and causation to Lanham Act standing question" (quotation omitted)). In any event, the presumption is properly limited to circumstances in which injury would indeed likely flow from the defendant's objectionable statements, i.e., when the defendant has explicitly compared its product to the plaintiff's or the plaintiff is an obvious competitor with respect to the misrepresented product. *See Ortho*, 32 F.3d at 694; *Porous*, 110 F.3d at 1335. Clearly neither of these conditions exists here. Mr. Hutchinson's standing is deficient precisely because *he has no product* in competition with the Pfeils' painting.

A demonstration that the Pfeils' representations were patently false would not avail Mr. Hutchinson in his case. It might assist his Lanham Act claims on the merits, by obviating the need for proof of consumer confusion. Because he lacks a cognizable interest affected by such confusion, however, he still lacks standing to assert such claims in federal court.

Denial of Amendment

Mr. Hutchinson contends the district court abused its discretion when it refused to permit him to amend his pleadings to add a state tort law claim for negligent misrepresentation. The district court cited delay and the inapt procedural posture of the case, after summary judgment had already been granted on standing, as the grounds for denying leave to amend. *See* App. II at 521-22; App. III at 845. We do not question the soundness of this exercise of discretion,[6] but we deem it appropriate to affirm the denial of the attempted amendment on the more fundamental ground of standing.

"Standing [under Article III] is, of course, a threshold issue in *every case* before a federal court," and diversity claims are no exception. *Wolfe v. Gilmour Mfg. Co.*, 143 F.3d 1122, 1126 (8th Cir. 1998) (emphasis added); *see also Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir. 1994). Thus, the jurisdictional deficiency discussed above in connection with the Lanham Act would be equally fatal to the proposed negligent

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[6] We note in this regard the speciousness of Mr. Hutchinson's procedural objection that the district court "[mis]led counsel to believe it would defer ruling on [summary judgment] until after a scheduling conference was conducted and a scheduling order entered," lulling him into believing amendment could safely be postponed. Opening Brief at 39. The court, in fact, conducted the conference, set summary judgment for a subsequent hearing, and explained that further scheduling would proceed only if needed. See docket entry for July 21, 1995.

misrepresentation claim, which rests on the same speculative injury. Because Mr. Hutchinson lacked standing to assert his new claim and does not argue that adding the "proposed plaintiffs" cured this deficiency, his futile amendment was properly rejected in any event. *See TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir. 1992) ("Where a complaint, as amended, would be subject to dismissal, leave to amend need not be granted.") (quotation omitted); *Manson v. Stacescu*, 11 F.3d 1127, 1133 (2d Cir. 1993) (rejecting as futile proposed amendment of claim plaintiffs lacked standing to assert).

Case Reassignment

Mr. Hutchinson argues that the district judge who entered judgment in this case lacked authority to hear and decide it, because it had been transferred unilaterally from another judge of the district in a manner not expressly authorized by the local rules, specifically N.D. Okla. L.R. 40.1 (Assignment of Cases). This court recently rejected essentially the same objection in a criminal case, explaining:

> In light of this [judicial] discretion in managing court business [derived from 28 U.S.C. § 137 and Fed. R. Crim. P. 57(b)[7]], we agree with the Fifth Circuit that: "[d]istrict judges may by *rule, order or consent* transfer cases between themselves . . . . Each judge of a multi-district court has the same power and authority as each other judge. . . . Moreover, the District Judges have the inherent power to transfer cases from one another for the expeditious administration of justice." United States v. Martinez, 686 F.2d

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[7] In the present civil context, Fed. R. Civ. P. 83(b) is to the same effect.

334, 338 (5th Cir. 1982) (quoting United States v. Stone, 411 F.2d 597, 598 (5th Cir. 1969)) (emphasis added).

United States v. Diaz, 189 F.3d 1239, 1244 (10th Cir. 1999). Further, nothing in Local Rule 40.1, which deals with the initial assignment of cases to judges in the district, proscribes or limits the traditional discretionary power of intra-district transfer recognized in *Diaz*. Finally, not only was the reassignment within the discretion of the district court, Mr. Hutchinson has failed to allege that the reassignment resulted in any constitutionally cognizable prejudice. *See id.* at 1244-45.

Protective Order

Finally, Mr. Hutchinson challenges the district court's refusal to modify or vacate a protective order entered by the magistrate judge covering testimony and materials obtained through discovery in connection with this and related litigation. Mr. Hutchinson has raised this same objection in more than one appeal and, recently, another panel of this court expressly affirmed the challenged order. *See Hutchinson v. Pfeil*, No. 98-5043, 1999 WL 1015557, at **5-**7 (10th Cir. Nov. 9, 1999). Although that decision was not published, it is nevertheless "binding . . . under the doctrines of res judicata, and collateral estoppel." 10th Cir. R. 36.3(A); *see Miller v. American Trust Ins. Co.*, 931 F.2d 703, 705 (10th Cir. 1991) (quoting prior version of Rule 36.3).

Motions

There are two contested procedural matters on appeal yet to be resolved. First, defendants have submitted as supplemental authority the Seventh Circuit's recent decision in *Hutchinson v. Spanierman*, 190 F.3d 815 (7th Cir. 1999), holding Mr. Hutchinson barred by laches from claiming an interest in a collection of Thomas Robinson paintings long held by other descendants of the artist. Mr. Hutchinson has moved to strike

the supplemental authority under Fed. R. App. P. 28(j), as irrelevant and argumentative. He has also submitted a request that we take judicial notice of the petition for rehearing now pending in the case. Neither party indicates whether an E.M.J. Betty, finished or unfinished, was ever included in the collection addressed by the *Spanierman* decision. In any event, because our analysis of Mr. Hutchinson's standing does not depend on legal ownership issues but, rather, the practical unavailability of the painting, Spanierman is immaterial to our holding. The motion to strike and request to take judicial notice are therefore denied as moot.

Second, as noted above, the Pfeils sold their E.M.J. Betty, and now Mr. Hutchinson has submitted a request that this court conduct proceedings to determine the identity of the undisclosed purchasers, so that he can add them as appellees. Mr. Hutchinson's lack of standing, which is dispositive of this case, does not turn on the identity of the present owners of the Pfeils' E.M.J. Betty. His request is therefore denied.

Conclusion

The appeal of intervenor-appellant Hope Cobb is DISMISSED as untimely. The appeal of the proposed plaintiffs-appellants is DISMISSED for lack of appellate standing. With regard to the appeal of plaintiff-appellant Thomas R. Hutchinson, the judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED in all respects. For reasons explained above, all pending motions are DENIED.

[Filed February 26, 1998]
[Entered on docket February 27, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-711-E

THOMAS R. HUTCHINSON, individually and as Personal Representative of the Estate of ANNE E. HUTCHINSON, deceased,

Plaintiff,

vs.

RICHARD B. PFEIL; MARY JOAN PFEIL; ART SERVICES INTERNATIONAL, INC.; WILLIAM H. GERDTS; DAVID BERNARD DEARINGER; SONA JOHNSTON; and SOUTH CHINA PRINTING COMPANY,

Defendants.

ORDER

Now before the Court is the Motion of Defendants for Entry of Final Judgment with Respect to Judgment Entered on August 1, 1995, or For Entry of Judgment for South China Printing Company and Memorandum in Support Thereof (Docket #138), the Defendant Sona Johnston's Motion for Entry of Final Judgment or Entry of Judgment in Favor of South China Printing (Docket #141), the Petition of Hope Cobb for an Order Permitting Her to Intervene and Assert a False Advertising Claim and Brief in Support of Petition for Intervention (Docket #151), Plaintiff's Motion to Substitute Thomas R.

Hutchinson for the Estate of Anne E. Hutchinson, Deceased; to Join Additional Parties; to File Third Amended Complaint; and to Amend Caption of Case (Docket #166); Plaintiff's Motion for Permanent Injunction (Docket #171) and Defendant Sona Johnston's Motion to Strike Plaintiff's Motion for Permanent Injunction (Docket #178).

This action began as a Lanham Act claim based on Plaintiff's belief that Defendants' have made misrepresentations concerning the "E.M.J. Betty," painted by Theodore Robinson and owned by the Pfeils. Plaintiff claims that there is more than one "E.M.J. Betty," that they are the rightful owners of the real "E.M.J. Betty," and that they are damaged by the misrepresentations concerning the other "E.M.J. Betty." Plaintiff admits that he is not in possession of the real "E.M.J. Betty," and does not know where it is located.

All Defendants, except South China Printing Company, who has not answered, moved for summary judgment. On August 1, 1995, the Court granted summary judgment in favor of the Defendants, finding that Plaintiff has no standing to bring suit under the Lanham Act because he cannot show that he has been or is likely to be damaged because he has never seen the "real E.M.J. Betty" and does not know who is in possession of the "real E.M.J. Betty." Plaintiff filed a Motion to Alter the Order Granting Summary Judgment, arguing that it was incorrect as a matter of law. That motion was considered and denied by this Court. After the Court granted summary judgment on the only pending claim, and almost two years after the original complaint was filed, Plaintiff filed a Petition for Leave to Join Additional Parties and File a Second Amended Complaint. The primary purpose of this motion was to add a claim of negligent misrepresentation. Based on the procedural posture of the case, where the only pending claim had been disposed of, and the unexplained delay in requesting to amend, the Court denied the request to file a second amended complaint.

At this same time, plaintiff filed an interlocutory appeal of what he termed the Court's non-final judgment because of the failure to include South China Printing Company. The Court of Appeals dismissed the appeal for lack of jurisdiction, but noted:

> The district court ruled against Hutchinson below on the grounds that he lacked standing to pursue claims under the Lanham Act. Assuming that Hutchinson's claims against South China are similar to those pursued against the appearing defendants, that ruling would appear to have equal applicability to South China. Assuming that to be the case, now that we have dismissed this appeal, it seems to us that the most efficient approach to resolve this litigation is for the district court to enter judgment as to South China on the same basis that was entered for the other defendants. [citations omitted] At that point, all the parties will have a final judgment, and a proper appeal may be taken to this court.

During the pendency of the appeal, plaintiff's counsel filed the Petition of Hope Cobb for an Order Permitting her to Intervene and Assert a False Advertising Claim and Brief in Support of Petition for Intervention. Hope Cobb claims that the provenance which the Pfeils attribute to their unfinished "E.M.J. Betty" actually belongs to a watercolor that she owns. After the appeal was dismissed, plaintiff filed another Motion to Substitute Thomas R. Hutchinson for the Estate of Anne E. Hutchinson, deceased, to Join Additional Parties; to File Third Amended Complaint; and to Amend Caption of Case. The Motion to Substitute is slightly different from the original one. The Motion to Join Additional Parties and File Third Amended Complaint is substantially the same as the Motion to Join Additional Parties and File Second Amended Complaint that was

previously denied by this Court. As with the Motion to File Second amended complaint, plaintiff seeks to add a claim for *negligent misrepresentation*. Also after the appeal was dismissed, the plaintiff filed a Motion for Permanent Injunction[1] which is essentially another motion for reconsideration of the Court's original Order granting summary judgment on the issue of standing.

Motion for Judgment in Favor of South China Printing

Because a concern over the non-finality of the Order granting Summary Judgment, after Plaintiff filed a Notice of Appeal, Defendants filed motions requesting either that the Court enter Final judgment, determining that there is no just

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[1] The argument included in the so-called "Motion for Permanent Injunction" demonstrates the true nature of Plaintiff's motion. Far from supporting a motion for permanent injunction, the argument in plaintiff's brief has the following headings: Defendants failed to establish that Hutchinson has no claim under Section 43(a)(1) of the Lanham Act as a matter of law; Two of Hutchinson's theories of liability were not addressed by defendants or the Court in its August 1, 1995 Order; Hutchinson need not be a competitor of the Pfeils or allege a competitive injury in order to have standing to assert his false association claim; Hutchinson's intangible interests in "The E.M.J. Betty" cannot be protected unless the Court finds that he has standing to seek an injunction to prevent continued use of a plagiarized title for the Pfeil E.M.J. Betty"; The Court should find, on reconsideration of its prior ruling, that Hutchinson has standing to assert his "false advertising claim"; Elements of a "false advertising" claim are sufficiently alleged in the Amended Complaint and supported by record evidence to establish Hutchinson's standing; Hutchinson has suffered an Article III "injury in fact"; There is a causal connection between the injury and the conduct complained of; It is likely that the alleged injuries will be redressed by a favorable decision; Proof that defendants' descriptions and representations of fact are literally false will sustain a finding of "irreparable injury" sufficient to support issuance of an injunction.

reason for delay, or that the Court enter Judgment in favor of South China Printing Company. Plaintiff argued that the Court was without jurisdiction to do either of the things requested by Defendants because of the Notice of Appeal. Accordingly, this Court did not Amend the Judgment or enter Judgment against South China Printing.

In dismissing the appeal for lack of jurisdiction, the Court of Appeals noted that this Court could enter judgment for South China Printing on the same basis as it entered judgment in favor of the other defendants. Notably, Plaintiff has never objected to this approach other than to assert that this Court could not do so while the matter was on appeal. Since the matter has been remanded, and a review of the Amended Complaint reveals that the claim against South China Printing is identical to that against other Defendants, the Court finds that judgment is appropriate in favor of South China Printing because Plaintiff does not have standing to pursue his Lanham Act claim. The Motions for Judgment are granted.

Motion to Intervene on Behalf of Hope Cobb

Hope Cobb seeks to intervene as a matter of right, arguing that plaintiff may represent her interests inadequately and that disposition of the action will impair her ability to protect her interest. Kiamichi R. v. National Mediation Board, 986 F.2d 1341, 1345 (10th Cir. 1993). She claims to have "a direct, substantial, legally protectable interest in the [pending] proceedings." Hobson v. Hansen, 44 F.R.D. 18, 24 (D.D.C. 1968). Cobb supports her request with the assertion that "[b]y seeking summary judgment in Case No. 94-C-1134-E the Pfeils have asked this Court to determine, as a matter of law, that the provenance which, in fact, establishes that Hope Cobb has valid title to the watercolor in her possession belongs, instead, to the Pfeils' unfinished "E.M.J. Betty."

Cobb's argument, at best, supports a request for intervention in Case No. 94-C-1134-E. Her motion, however, must be analyzed in light of the current procedural posture of this case. This case has been dismissed because of the plaintiff's lack of standing. There is no further decision that can be made which would "impair [Hope Cobb's] ability to protect [her] interest." Because of the current posture of this case, intervention would neither foster judicial economy nor protect her interest from being litigated in a proceeding in which she is not participating. Cobb's Motion to Intervene is Denied.

Motion to Substitute, Add Parties, and File Amended Complaint

This motion is, in substance identical to the one denied by the Court on November 9, 1995. Plaintiff seeks to add parties and file an Amended Complaint adding a claim for negligent misrepresentation. Plaintiff asserts that the Court's previous denial of the Motion to Amend should be revisited because its reason for denying the motion, previous entry of a final judgment, no longer exists since the Court of Appeals held that the judgment was not final.

The standard regarding a Motion to Amend was set out by the Court in Foman v. Davis, 371 U.S. 227, 83 S.Ct. 226 (1962):

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amend-

> ments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc., the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

In this instance, the Court finds, as it did in 1995, that amendment is not appropriate at this time. Undue delay, and the current posture of the case, where summary judgment has been granted in favor of all appearing defendants all dictate a denial of the motion. The Court is particularly mindful that the underlying facts supporting the claim for negligent misrepresentation are the same facts that supported the Lanham Act claim. There was nothing to prevent the plaintiff from bringing the negligent misrepresentation claim prior to the grant of summary judgment, or for that matter, at the time of filing the Complaint. The Motion to File Third Amended Complaint is denied, accordingly the Motions to Substitute Parties, Add Parties, and Amend the Caption are denied as moot.

Motion for Permanent Injunction

Plaintiff also seeks a permanent injunction regarding the Pfeils' use of the provenance for their "E.M.J. Betty." In seeking this permanent injunction plaintiff argues that the Court erred in its granting of the Motion for Summary Judgment and in ignoring theories that were advanced by the plaintiff in his Complaint. A thorough review of the record in this case, including the amended complaint and the transcript of the hearing on the motions, reveals that the record is devoid of any position taken by plaintiff that there is a claim other than a false

advertising claim under the Lanham Act. To attempt to give the amended complaint an interpretation at this late date that has not been attempted before is, at best, inappropriate. Because Plaintiff has no cognizable Lanham Act claim currently before this Court, there is no basis for Plaintiff's Motion for Permanent Injunction.

Conclusion

The Motion of Defendants for Entry of Final Judgment with Respect to Judgment Entered on August 1, 1995, or For Entry of Judgment for South China Printing Company and Memorandum in Support of Thereof (Docket #138), and the Defendant Sona Johnston's Motion for Entry of Final Judgment or Entry of Judgment in Favor of South China Printing (Docket #141) are granted in part and denied in part. The Court hereby enters judgment in favor of South China Printing Company and against Plaintiff on the Lanham Act claim for lack of standing. The Petition of Hope Cobb for an Order Permitting Her to Intervene and Assert a False Advertising Claim and Brief in Support of Petition for Intervention (Docket #151) is denied. Plaintiff's Motion to Substitute Thomas R. Hutchinson for the Estate of Anne E. Hutchinson, Deceased; to Join Additional Parties; to File Third Amended Complaint; and to Amend Caption of Case (Docket #166) is denied. Plaintiff's Motion for Permanent Injunction (Docket #171) is denied. Defendant Sona Johnston's Motion to Strike Plaintiff's Motion for Permanent Injunction (Docket #178) is denied as moot.

In light of these rulings, the Application for Status Conference (Docket #159), the Supplemental Application for Status Conference (Docket #162), the Motion for Scheduling/Case Management Conference (Docket #163), the Request of Plaintiffs and Hope Cobb that the Court take Judicial Notice of their Constitutionally Protected Right of Access to the Court Before It Rules on Pending Motions (Docket #165), and the Request

for Evidentiary Hearing on Plaintiff's Motion for Permanent Injunction (Docket #170) are all moot.

The Application for Attorneys' Fees and Costs to be Assessed Against Plaintiffs and Their Counsel (Docket #109), the Application for Attorney fees (Docket #111), the Defendants' Motion for Assessment of Sanctions Pursuant to Rule 11 (Docket #118) and Defendant Sona Johnston's Motion for Assessment of Sanctions Pursuant to Rule 11 (Docket #133) are all stayed pending the appeal of the Court's August 1, 1995 Order.

In light of the fact that the issues raised in the above-discussed motions have, for the most part been previously considered by this Court, and that the primary issue in this case, that of standing of the plaintiff to bring this claim, have already been briefed before the Court of Appeals, the Court directs all parties to not file any additional pleadings in this case without first obtaining leave of Court.

IT IS SO ORDERED THIS 26th DAY OF FEBRUARY, 1998.

s/ James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

[Filed August 1, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-711-E

THOMAS R. HUTCHINSON and ANNE E. HUTCHINSON,

Plaintiffs,

vs.

RICHARD B. PFEIL, MARY JOAN PFEIL, ART SERVICES INTERNATIONAL, INC., WILLIAM H. GERDTS, DAVID BERNARD DEARINGER, SONA JOHNSTON,

Defendants.

ORDER

Now before the Court is the Motion to Dismiss of the Defendants Richard B. Pfeil and Mary Joan Pfeil (Docket #6), the Motion to Dismiss of the Defendant Sona Johnston (Docket #10), the Motion to Dismiss of the Defendant Art Services International, Inc. (Docket #33), and the Motion for Summary Judgment of the Defendants Richard B. Pfeil, Mary Joan Pfeil, Art Services International, Inc., William H. Gerdts, and David Bernard Dearinger (Docket #45).

Plaintiffs' bring this claim, alleging that misrepresentations concerning the "E.M.J. Betty," a painting owned by the Pfeils, made in the exhibition catalogue, Masterworks of American Impressionism from the Pfeil Collection violate the Lanham Act. The catalogue was prepared in 1990 by William Gerdts

and his research assistant David B. Dearinger at the request of Richard Pfeil. The catalog was prepared to accompany an exhibition of the Pfeil collection which was arranged by the Pfeils and Art Services International (ASI). ASI also had the task of editing the catalogue. The catalogue contained information provided Sona Johnston, an art historian, in response to inquiries from Dearinger.

Plaintiff claims that there is more than one "E.M.J. Betty," and asserts that the Masterworks catalogue contains misrepresentations concerning the "E.M.J. Betty" owned by the Pfeils: 1) that the Pfeils' painting was signed and dated by Theodore Robinson; 2) that the Pfeils' painting was exhibited at Macbeth Gallery and the Cotton States Exposition in 1895; 3) that the Pfeils' painting was sold to G. Schirmer as Lot 73 at the Theodore Robinson Estate sale; 4) that Theodore Robinson finished the Pfeils' painting; and 5) that the Pfeils' painting is a painting Robinson viewed as a finished work worthy of being exhibited and offered for sale.

Plaintiffs' claim is based on Section 43 of the Lanham Act, 15 U.S.C. § 1125, which provides in pertinent part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -- (a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval or his or her goods, services, or commercial activities by another person, or (b) in commercial advertising

> or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The Pfeils argue that Plaintiffs' claims should be dismissed for failure to state a claim, for lack of personal jurisdiction and improper venue. Sona Johnston argues that she has insufficient contacts with the state of Oklahoma for personal jurisdiction, that she has made no false or misleading statements for a commercial purpose, that the Plaintiffs have no standing for a Lanham Act claim, that the plaintiffs have failed to join indispensable parties, and that the Plaintiffs' claim is barred by the statute of limitations. The Pfeils, ASI, Gerdts and Dearinger filed a motion for summary judgment, arguing that the Plaintiffs have no standing because they cannot show that they have been or likely will be damaged.

Discussion

A motion to dismiss is appropriate when "it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief." Ash Creek Mining Company v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992) (citations omitted). The complaint must be construed in favor of plaintiff, and all material allegations accepted as true. Id.

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation,

805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56© mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts. . ." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Because the issue of standing is dispositive, and because defendants present undisputed facts in support of their argument on standing, the Court will consider the motion for summary judgment first. The Defendants argue that Plaintiffs have no standing to bring suit under the Lanham Act because Plaintiffs cannot show that they have been or are likely to be damaged. The Defendants[1] rely on the undisputed fact that Plaintiffs admit that they do not have the "real E.M.J. Betty," have never seen the "real E.M.J. Betty" or a copy of the "real E.M.J. Betty" and do not know who is in possession of the "real E.M.J. Betty."

With respect to standing on a § 1125 claim, the Tenth Circuit has recently held that "to have standing for a false advertising claim, the plaintiff must be a competitor of the

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[1] The motion for summary judgment was filed on behalf of all Defendants except Sona Johnston. Johnston, however, made the identical argument regarding standing in her motion to dismiss.

defendant and allege a competitive injury." Stanfield v. Osborne Industries, Inc., 52 F.3d 867 (10th Cir. 1995).[2] In finding that the plaintiff did not have standing in that case, the court noted that plaintiff "is not now, nor has he ever been, in competition with defendants." Id. The Stanfield Court also noted that "the mere potential of commercial interest in one's family name is insufficient to confer standing." Id. Thus, the potential of competition is not sufficient to confer standing.

Plaintiffs argue, relying on Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991), that they can establish ownership of the "real E.M.J. Betty" and are therefore competitors with standing to bring this claim. Plaintiffs also assert that the complaint must be construed in the light most favorable to Plaintiff, and that the amended complaint does allege competition. Plaintiffs, however, miss the point. Defendants presented undisputed evidence that calls into question Plaintiffs standing and Plaintiffs are unable to refute that evidence.

The fact that Plaintiffs can establish ownership of the "real E.M.J. Betty" does not, alone, satisfy the requirements of standing. Plaintiffs do not now, and have not in the past competed with the Pfeils. Moreover they do not know the location of the "real E.M.J. Betty" which would allow them to compete with the Pfeils at this time. In fact, they do not know that the "real E.M.J. Betty" exists at this time. The potential of competition is insufficient to confer standing, particularly when the potentiality is as speculative as it is in this case. See Stanfield, 52 F.3d at 873.

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[2] There are two types of claims under section 1125: false advertising and false association. See Stanfield, 52 F.3d at 873. Plaintiff's claim is for false advertising.

Defendants' Motion for Summary Judgment (Docket #45) is granted.

IT IS SO ORDERED THIS 31st DAY OF JULY, 1995.

s/ James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

[Filed May 25, 2000]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-5260

THOMAS R. HUTCHINSON, individually,

Plaintiff - Appellant,

v.

MARY JOAN PFEIL; ART SERVICES INTERNATIONAL, INC.; WILLIAM H. GERDTS; DAVID BERNARD DEARINGER; SOUTH CHINA PRINTING COMPANY; RICHARD B. PFEIL; SONA JOHNSTON,

Defendants - Appellees.

ORDER
Filed May 25, 2000

Before EBEL, LUCERO, and MURPHY Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ [illegible]
Deputy Clerk